No. 05-1429

IN THE

Supreme Court of the United States

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. The Bankruptcy Code provides that a creditor's claim for contractual postpetition attorneys' fees is allowed "[t]o the extent that" the creditor is oversecured. Travelers is an unsecured creditor. Should its contractual claim for attorneys' fees be disallowed?

2. Travelers issued bonds to assure PG&E's performance of certain obligations. PG&E filed for bankruptcy, but never defaulted on the underlying obligations. Nevertheless, Travelers took steps in the bankruptcy proceeding that, as three courts in a row have held, were unnecessary to preserve its legal rights. Was the Court of Appeals correct in rejecting the claim for attorneys' fees on that basis?

3. Travelers' contract calls for the payment of fees in connection with "enforcing" its contractual rights. Because PG&E never defaulted on its insured obligation there were no contractual rights for Travelers to enforce. Should the disallowance of attorneys' fees be affirmed on the alternative ground that Travelers had no contractual right to attorneys' fees?

CORPORATE DISCLOSURE STATEMENT

Respondent Pacific Gas and Electric Company is a subsidiary of PG&E Corporation. No other publicly traded company owns more than 10% of its stock.

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INTRODUCTION

Petitioner Travelers Casualty & Surety Company of America ("Travelers"), an unsecured creditor, intervened in the bankruptcy proceeding of Respondent Pacific Gas and Electric Company ("PG&E"). PG&E did not owe Travelers any money, and the bankruptcy filing did nothing to undermine Travelers' position under its contracts with PG&E. Yet, Travelers hired a team of lawyers to press a claim—only to concede the claim was not allowed—and to negotiate gratuitous changes to various bankruptcy documents. The Bankruptcy Court, District Court, and Court of Appeals all held that Travelers' conduct did nothing to enhance or protect its rights.

Travelers then presented PG&E with a bill for its lawyers' efforts. It invoked a contractual provision requiring PG&E to reimburse any legal expenses Travelers might incur "enforcing" its contractual rights.

The courts below all agreed that Travelers could not recover its legal fees. They relied mainly on settled Ninth Circuit law—the "*Fobian* rule"—prohibiting the recovery of attorneys' fees for litigation of pure issues of bankruptcy law, while allowing recovery for litigation over state law issues. The central theme in Travelers' brief is that the Bankruptcy Code unequivocally allows an unsecured creditor with a contractual fee-shifting provision to recover attorneys' fees for its postpetition litigation in bankruptcy court. If Travelers' reading of the Code is correct, then every credit card issuer, every lender, and, indeed, most creditors with a written contract can inflate its claims simply by opting to hire expensive lawyers to intervene in, or just monitor, the bankruptcy proceedings.

Travelers is wrong. The Code does not permit unsecured creditors to recover postpetition attorneys' fees. And, as the Court of Appeals pointed out, the Code certainly does not

reward a creditor for pointless and wasteful meddling. Thus, this Court need not decide whether the *Fobian* distinction has any validity. It should affirm, without regard to *Fobian*, on much more straightforward grounds.

RELEVANT PROVISION OF LAW

Beyond the provisions Travelers lists, 11 U.S.C. §§ 506(a) & (b) are also central to this case, and are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE[1]

The facts relevant to PG&E's primary argument can be stated in one sentence: Travelers was an unsecured creditor that sought reimbursement from debtor PG&E for attorneys' fees incurred in intervening in a bankruptcy proceeding. The following details are unimportant unless this Court rejects, or declines to address, PG&E's primary argument.

PG&E Files for Bankruptcy Without Undermining Travelers' Contractual Rights

PG&E filed a voluntary Chapter 11 bankruptcy petition in April 2001. PG&E continued to operate and manage its business as a "debtor in possession." §§ 1107(a), 1108. With the petition, PG&E filed an "Emergency Motion"

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[1] The Brief for Petitioner is cited as "Pet'r Br." The Appendix to the Petition for Writ of Certiorari, the Joint Appendix, and the Supplemental Joint Appendix are cited as "PA," "JA," and "SJA," respectively. The Excerpts of Record in the Court of Appeals are cited as "ER." The Bankruptcy Code is cited by section, without the prefix "11 U.S.C." Unless otherwise specified, citations will be to the Code as it existed at the time of the filing of this bankruptcy case, in 2001, *see* 11 U.S.C. § 101 et seq. (2000), without regard to the recent amendments of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, which are inapplicable to this case. The Brief of Amici Curiae Profs. Richard Aaron, et al., is cited as "Law Profs."

seeking permission to continue honoring its workers' compensation obligations. That very day, the Bankruptcy Court approved the request. PA 5a; JA 24-25. PG&E has satisfied all of its workers' compensation obligations, and never hinted that it might default on them. PA 5a.

This is a critical fact from the standpoint of Travelers' financial exposure. Travelers had issued surety bonds assuring PG&E's performance of its obligation to pay workers' compensation benefits. PA 5a. PG&E, in turn, executed indemnification agreements, to indemnify Travelers in the event Travelers was ever called upon to cover a defaulted payment under the surety bonds. PA 5a; SJA 3-4; JA 113-14. But, as the courts below all recognized and Travelers stipulated, Travelers never "had to assume any liability pursuant to the bonds" because "PG&E has not defaulted on its workers' compensation obligations." PA 5a.

Travelers Files a Claim, But Stipulates It Is Not Allowed

Nevertheless, Travelers filed a claim against PG&E in the bankruptcy proceeding. SJA 1. This claim (referred to as the "Original Claim") did not assert that PG&E owed Travelers any money. PA 5a. Rather, the claim was based upon the contingency that PG&E *might* some day default on its workers' compensation obligations, and if it did, Travelers *could* be liable to pay the workers. *Id.* If Travelers ever did make those payments, it would have two rights. First, Travelers would have a reimbursement right—the right to demand that PG&E reimburse it for the outlay. *Id.* Second, it would have a subrogation right—the right to stand in the shoes of any injured employees whose payments it covered and assert their claims against PG&E. *Id.*

PG&E objected to the claim. Contrary to Travelers' repeated assertions, this objection did not "commence[] litigation" against Travelers, and could not have "extinguished or impaired" any of Travelers' contractual

rights. *E.g.*, Pet'r Br. at 16; *id.* at 1, 17, 22; *see Travelers Cas. & Sur. Co. v. PG&E Corp.*, No. C-05-0594, 2005 WL 1039080 at *2-*3 (N.D. Cal. May 4, 2005) (rejecting the same assertion, on the same facts, in a parallel case Travelers brought against PG&E's parent company). PG&E did not request any relief other than that the Bankruptcy Court "disallow" these claims, JA 80—in other words, that the court rule that these claims could not be a basis for any recovery of money *in the bankruptcy proceeding*. *See* § 502(b). As to Travelers' reimbursement claim, PG&E pointed out that the Code disallowed any such claim unless and until PG&E defaulted on its underlying obligations. *See* § 502(e)(1)(B). Otherwise, PG&E would be subject to multiple liability to the primary obligee (here, the injured worker) and the surety (Travelers) for the same debt. As to Travelers' contingent subrogation rights, PG&E observed that they are not valid claims in a bankruptcy proceeding, because a subrogation right is not a "right to payment," § 101(5)(A), and, in any event, the right is automatically preserved by operation of the Bankruptcy Code. *See* § 509(a). At this point, there is no dispute that PG&E was correct that neither the reimbursement nor the subrogation claim was allowable. JA 137 (Travelers admits "that our contingent reimbursement rights were subject to disallowance"); Pet'r Br. at 11 n.6, 14 (acknowledging that subrogation rights are not valid claims).

Nevertheless, Travelers paid its legal team $77,000 to draft a 45-page brief arguing that its claims were allowable. JA 120; FR 288-91. Before the Bankruptcy Court could resolve the issue, Travelers conceded otherwise. Travelers stipulated that the reimbursement claim "is hereby disallowed pursuant to Section 502(e)(1)(B) of the Bankruptcy Code," just as PG&E said, because "Travelers has not been called upon to satisfy any of the obligations assured by, or to make any payment with respect to, any of

its Surety Bonds or the Indemnity Agreements." JA 107. As to the subrogation rights, Travelers agreed to the disallowance of its claim, subject to its ability to assert certain potential subrogation rights in the future, and PG&E's ability to object to them: "[N]othing [in the Stipulation] shall prejudice or impair Travelers' subrogation rights under applicable law, or the Debtor's right to object to Travelers' asserted subrogation rights." JA 108. As the Bankruptcy Court observed, this provision did not reserve for either party a benefit that it would not have had anyway by operation of law. JA 128-30. The whole exercise was the litigation equivalent of running on a treadmill while tearing up $100 bills.

The Stipulation also acknowledged that Travelers was free to assert a claim for reimbursement of the attorneys' fees it incurred under the indemnity agreements that were the basis for the Original Claim. JA 108-09. That, too, was an empty assurance, for the parties also agreed that PG&E would be free to object to any such claim. *Id.* Based on this Stipulation, the Bankruptcy Court disallowed Travelers' Original Claim. JA 110.

The Reorganization Plans All Preserve PG&E's Workers' Compensation Obligations

In any Chapter 11 bankruptcy, the documents that shape subsequent duties and obligations are the plan of reorganization (as confirmed by the bankruptcy court) and the related disclosure statement. There is no dispute that every iteration of PG&E's plan and disclosure statement undertook that PG&E would continue to comply fully with all its workers' compensation obligations. JA 28, 60-62. No proposed plan or disclosure statement purported to limit or modify any of PG&E's obligations or Travelers' rights.

Nevertheless, Travelers demanded additional assurances. The parties negotiated what is often called "comfort

language"—superfluous, but innocuous, edits that soothe the creditor without conveying any real legal benefit. First, Travelers insisted on inserting language to underscore what the plan already said, that PG&E would continue to honor its workers' compensation obligations. JA 54, 64. Second, Travelers bargained for language to confirm, again, what was already true as a matter of law, *see* Pet'r Br. at 11 n.6, that nothing in the plan would affect the subrogation rights of any surety of workers' compensation claims. JA 54-56, 62-66. Travelers has never asserted that, without these verbal placebos, the plan could be read to cut off Travelers' potential reimbursement or subrogation rights, but actually admitted otherwise. JA 29-34, 128.[2]

Whenever such comfort language was inserted into any iteration of the plan or disclosure statement, it was coupled with a companion clause reserving PG&E's converse right to object to asserted subrogation rights. *See, e.g.*, JA 54 ("Nothing herein shall affect . . . the rights of the Debtor to object, pursuant to the Bankruptcy Code, to the existence of any such subrogation rights."). While Travelers now asserts that PG&E snuck in this clause later, "unilaterally" modifying the language the two had negotiated, Pet'r Br. at 14; *see id.* at 15-16, the truth is that every iteration of the plan Travelers cites had the same clause—as did the above-quoted Stipulation, itself. JA 54, 108. The final plan, which the Bankruptcy Court ultimately confirmed in 2003, included both the comfort language and the supposedly offensive

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[2] Contrary to Travelers' assertion, the Bankruptcy Court did not find the disclosure statement "inadequa[te]" and did not "require[] PG&E to" change it. Pet'r Br. at 13. As is evident from the transcript pages Travelers cites, and its own account of the negotiations, *see id.* at 14, the court was simply helping the parties negotiate a consensual resolution. *See* JA 40-41, 43-45, 48-49. That is why the court later concluded that Travelers did not prevail in any of its arguments, PA 21a, 23a, as every other court below agreed, PA 2a, 18-19a.

reservation of PG&E's right to oppose subrogation claims. JA 54, 57.

Travelers Seeks Attorneys' Fees for Its Meritless Litigation and Superfluous Comfort Provisions

Travelers filed an Amended Claim, demanding that PG&E cover the legal fees and other expenses Travelers incurred in connection with its activities in the bankruptcy proceeding. SJA 18. The bill came to $167,000. SJA 20-21. The Amended Claim for postpetition attorneys' fees was not premised on any right under the Bankruptcy Code, which does not grant attorneys' fees to an unsecured creditor, except for efforts directed to the benefit of all creditors. *See* § 503(b)(3), (4). Rather, Travelers sought fees as a "claim" in its own right, flowing from a provision of its indemnity agreements with PG&E. The agreements specified that PG&E would be obliged to pay attorneys' fees incurred in "recovering or attempting to recover any salvage in connection [with the surety bonds] or enforcing by litigation or otherwise any of the [indemnification] agreements." SJA 9, 13; *see* Pet'r Br. at 7 (quoting the provision more fully).

PG&E objected to Travelers' attorneys' fees claim on several grounds. Three of them, which PG&E raised at every level, are especially relevant here. The first was an issue of contract interpretation: Travelers had no right to attorneys' fees under the indemnity agreement, because its contingent claim and subsequent negotiations were not part of an action brought on account of the bond, let alone one directed at "enforcing . . . any of the [indemnification] agreements." SJA 13. Second, even if a creditor generally could claim attorneys' fees for its activities in a bankruptcy proceeding, Travelers could not collect fees for its meritless and wasteful activities in this proceeding. Third, PG&E invoked a long line of Ninth Circuit precedents—most notably *Fobian v. W. Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)—which precluded a creditor

from collecting attorneys' fees incurred with respect to purely bankruptcy law matters, as opposed to state law matters such as the terms or enforceability of a contract.

The Bankruptcy Court and District Court Reject Travelers' Demand for Attorneys' Fees

The Bankruptcy Court disallowed the claim for attorneys' fees. PA 20a-21a, 23a-25a. The court focused mainly on the *Fobian* rule, for the rule was binding authority, and it was clear that all of the attorneys' fees Travelers sought were incurred in litigating pure issues of federal bankruptcy law. PA 24a; JA 130-31, 133, 141. But the Bankruptcy Court also made observations bearing on PG&E's other two grounds. The court observed that Travelers had no basis for filing the Original Claim in the first place as a matter of federal bankruptcy law. JA 133 ("[Travelers] didn't have to file a Proof of Claim .... [Travelers] had no claim to file."). The Bankruptcy Court also found that neither PG&E's objections to the Original Claim nor PG&E's reorganization plans did anything to threaten Travelers' rights. JA 133-34, 139, 141-43.

On appeal to the District Court, PG&E once again asserted all three grounds for affirmance. PA 4a; JA 20. The District Court affirmed. PA 19a. It, too, focused mainly on the *Fobian* rule. PA 17a. But it, too, made findings supporting PG&E's other arguments, noting, for example, that "the measures employed by Travelers cannot be considered 'an action on the contract[s]' or bonds." *Id.*

The Court of Appeals Affirms, Citing Especially Unsympathetic Facts

The Court of Appeals affirmed. PA 1a. Beyond the *Fobian* analysis, two points were especially relevant to its holding. First, the court held that "[n]othing in the federal bankruptcy proceedings required Travelers to satisfy any of the obligations assured by, or to make any payments with

respect to, any of its surety bonds or indemnity agreement with [PG&E]." PA 2a. Second, "Travelers did not prevail on any claim it asserted in the bankruptcy proceedings." *Id.* The Court of Appeals underscored the dangers of awarding attorneys' fees when these two elements converged:

> [I]f unimpaired, non-prevailing creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims, the system would likely be overwhelmed by fee applications, with no funds available for disbursement to impaired creditors or debtor reorganization.

PA 3a.

Although the Court of Appeals did not dispose of the question of contract interpretation, like the Bankruptcy Court and the District Court before it, the court did make observations bearing on the issue. It pointed out, for example, that "Travelers' objection to the reorganization plan . . . claimed only that the debtor failed to provide 'adequate information' about the reorganization plan," PA 2a, a far cry from "enforcing" its contractual right.

SUMMARY OF ARGUMENT

This Court need not decide whether the *Fobian* distinction is ever correct. For three reasons, Travelers is not entitled to its attorneys' fees, without regard to *Fobian*: (1) unsecured creditors are not entitled to postpetition attorneys' fees; (2) even if they were, Travelers would not be entitled to collect fees because its activities were not reasonably necessary to protect its rights; and (3) Travelers did not, in any event, have any right to attorneys' fees, under its contracts, for its interventions here.

No postpetition fees for unsecured creditors. Contrary to Travelers' central argument, unsecured creditors cannot claim attorneys' fees by contract for participating in a

bankruptcy proceeding. That is the majority rule among the lower courts. Section 502(b) of the Code, which governs allowance of claims, directs that a claim is determined "as of the date of the filing of the petition." If one were to focus myopically on this provision alone, it would be unclear whether a claim for postpetition attorneys' fees is allowed—and, if so, whether any such claim would have to be valued at zero.

Any ambiguity, however, is resolved by another Code provision that refers specifically to contractual fees such as attorneys' fees. Section 506(b) provides that such fees are available "[t]o the extent that" a creditor is oversecured (which means that the creditor's collateral is worth more than the amount of the debt it supports). That must mean that attorneys' fees are not allowed to an unsecured creditor (with no collateral). Any other reading would make § 506(b) superfluous, for it would have been pointless to specify in § 506(b) that oversecured creditors could claim contraetual fees, if § 502(b) already gave all creditors—unsecured and secured, alike—an allowable claim for such fees. This Court has confirmed that this is the only way to read § 506(b). *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371-75 (1988). No other reading would save § 506(b) from redundancy.

The rule Travelers proposes is antithetical to the rudiments of bankruptcy policy expressed in the Code. First, for centuries, one of the dominant features of bankruptcy law has been a temporal divide between prepetition and postpetition liabilities; allowing unsecured creditors to collect expenses they opted to incur postpetition would breach that divide. Second, ingrained in the Code is the equally venerable bankruptcy principle of equality of distribution among a class of creditors; allowing some creditors within the class to bloat their own claims would flout that principle. Third, the Code preserves the

longstanding rule that unsecured creditors can recover attorneys' fees only when they have benefited the estate. Fourth, endless litigation over fees would deplete the debtor's assets and burden courts, undermining the Code's goals of maximizing realization for all creditors and prompt and efficient administration.

History, too, confirms this reading. For ages, the rule has been that unsecured creditors could not recover postpetition attorneys' fees. This Court did nothing to alter the rule in *Security Mortgage Co. v. Powers*, 278 U.S. 149 (1928), which held only that an *over*secured creditor could recover attorneys' fees under the Bankruptcy Act, for reasons that are inapplicable to unsecured creditors. In the ensuing 50 years—right up to the adoption of the Code—not a single court ever held that an unsecured creditor could recover fees by contract. Any such notion would have been anathema to the Code's drafters. Since the Code does not explicitly overturn this established practice—and the legislative history indicates that no one even suggested a change—Congress is presumed to have left it intact.

This Court should reach this issue of statutory construction, even though it was not addressed below. First, it would have been futile, in light of *Fobian*, to raise the argument. Second, Travelers' brief revolves around the proposition that the Code allows unsecured creditors to collect attorneys' fees, inviting scrutiny of that position. Third, this case also presents a narrower question of statutory construction—which was preserved below and resolved by the Court of Appeals—but that question cannot be resolved without addressing the broader question. Fourth, the lower courts have been irreconcilably split for two decades.

No postpetition fees for unnecessary activities. Travelers was not the average unsecured creditor seeking to collect a debt owed to it, but an officious intermeddler. Its activities did not preserve any rights it did not already have,

and served only to squander estate assets. If § 502(b)'s general allowance provision is to be stretched to contemplate a right to collect contractual attorneys' fees, it must be read to limit recovery to fees that are reasonably necessary. As three courts below all agreed, Travelers' activities were not.

No right under contract language. The premise of this appeal—that Travelers has a contractual right to collect attorneys' fees in connection with its bankruptcy interventions—is false. The contract covers efforts to "enforc[e]" PG&E's obligations, but PG&E never defaulted on its obligations.

ARGUMENT

The question Travelers presents for review is whether Travelers, an unsecured creditor, "may recover [postpetition] attorneys' fees arising under a contract . . . where the issues litigated involve matters of federal bankruptcy law." Pet'r Br. at i. The answer is no—but not because Travelers litigated "matters of federal bankruptcy law." This Court need not address whether the *Fobian* distinction has any validity—whether, for example, there could *ever* be a circumstance under which a creditor could recover postpetition attorneys' fees for litigating issues of state law. Whether or not *Fobian* has any validity in some other case, the answer to the Question Presented is no, for two more straightforward statutory reasons—one broad and the other narrow—and another legal reason based upon the specific contract in this case. We address each in turn.

I. THE BANKRUPTCY CODE DOES NOT ALLOW UNSECURED CREDITORS TO RECOVER POSTPETITION ATTORNEYS' FEES BY CONTRACT.

Travelers' challenge to *Fobian* revolves around a single premise. To quote a point heading encompassing eight

pages of Travelers' brief, its central premise is: "Travelers' Claim For Attorneys' Fees Is Allowable Under The Plain Text Of The Bankruptcy Code." Pet'r Br. at 21. Specifically (to quote another point heading), Travelers' position rests on the view that "Travelers' claim must be allowed under section 502(b) of the Bankruptcy Code," *id.* at 28. Throughout its brief, with metronomic regularity, Travelers repeats, no fewer than a dozen times, that "[n]o provision of the Code even remotely purports to *disallow* Travelers' claim." *Id.* at 22 (emphasis in original).[3]

Travelers' premise is wrong. Travelers is an unsecured creditor. It is in the same boat as any trade creditor, tort claimant, or other creditor that has not negotiated to secure its debt with collateral. Like virtually any credit card company, and innumerable other contractual creditors, Travelers has a contractual provision entitling it to recover its collection costs when the debtor defaults. *See, e.g., Recovering Attorney's Fees and Costs in Bankruptcy Cases*, 19-May Am. Bankr. Inst. J. 32 (2000) ("Most commercial contracts have standard provisions authorizing the collection of such fees and costs . . . ."); *In re Sakowitz, Inc.*, 110 B.R. 268, 271 (Bankr. S.D. Tex. 1989) ("[V]irtually all promissory notes, deeds of trust, and security agreements provide for attorney fees."). Travelers' position is that the Code entitles every such contractual creditor to enhance its share of the bankruptcy recovery vis-à-vis all other unsecured creditors, by inflating its underlying claim (which,

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[3] *See, e.g.*, Pet'r Br. at 2 ("no provision of the Bankruptcy Code disallows the claim"); *id.* at 28 ("[T]he plain language of section 502(b) . . . requires the allowance of Travelers' claim for its fees."); *id.* at 33 ("[N]othing in the Bankruptcy Code even remotely purports to expressly or impliedly pre-empt . . . a party's contractual obligation to pay attorneys' fees."); *see also id.* at 28 (two additional such statements); *id.* at 35, 41, 42, 42-43, 45, 46, 49.

in this case, was zero) with the expenses it incurs in bankruptcy court collecting the debt or just monitoring the proceedings.

That is not what the Code says—as this Court has held in *Timbers*, 484 U.S. at 371-75, which interprets the very same provisions at issue here. *See infra* Point I.A. Allowing one class of unsecured creditors to jockey in this way for a bigger piece of the pie would be inconsistent with the Code's structure and purpose. *See infra* Point I.B. Indeed, in light of the historical backdrop, Travelers' reading would have been anathema to the Code's drafters. *See infra* Point I.C.

That is why most of the courts that have addressed the question have concluded that unsecured creditors generally cannot collect attorneys' fees incurred after the filing of the bankruptcy petition, even if they can point to a contract purporting to allow such fees. *See In re Pride Cos.*, 285 B.R. 366, 372 (Bankr. N.D. Tex. 2002) (cataloging cases and describing this as the view supported by "[t]he majority of published opinions").[4] While some cases have awarded

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[4] *E.g.*, *In re Miller*, 344 B.R. 769, 773 (Bankr. W.D. Va. 2006); *In re Global Indus. Techs., Inc.*, 327 B.R. 230, 239 (Bankr. W.D. Pa. 2005); *In re Hedged-Invs. Assocs.*, 293 B.R. 523, 526 (Bankr. D. Colo. 2003); *Pride*, 285 B.R. at 372; *In re Loewen Group Int'l*, 274 B.R. 427, 444-45 (Bankr. D. Del. 2002); *In re Smith*, 206 B.R. 113, 115 (Bankr. D. Md. 1997); *Chem. Bank v. First Trust of N.Y. Nat'l Ass'n (In re Southeast Banking Corp.)*, 188 B.R. 452, 462-63 (Bankr. S.D. Fla. 1995), *aff'd*, 212 B.R. 682 (S.D. Fla. 1997), *rev'd on other grounds*, 156 F.3d 1114 (11th Cir. 1998); *In re Woodmere Investors, Ltd. P'ship*, 178 B.R. 346, 356 (Bankr. S.D.N.Y. 1995); *In re Barrett*, 136 B.R. 387, 394-95 (Bankr. E.D. Pa. 1992); *In re Saunders*, 130 B.R. 208, 210-11 (Bankr. W.D. Va. 1991); *In re Sakowitz, Inc.*, 110 B.R. 268, 272 (Bankr. S.D. Tex. 1989) ; *see also Adams v. Zimmerman*, 73 F.3d 1164, 1177 (1st Cir. 1996) (citing the rule with approval); *In re Waterman*, 248 B.R. 567, 573 (8th Cir. BAP 2000) (same); *Ins. Co. of N. Am. v. Sullivan*, 333 B.R. 55, 60 (D. Md. 2005) (same); Hon. Burton Lifland, Lawrence Mittman & Rees Morrison, *Bankruptcy Commentary*, 49 Brook. L. Rev. 741, 772-74 (1983) (supporting majority rule).

postpetition attorneys' fees by contract,[5] courts that have addressed the question in the last decade are almost unanimous (19 out of 22) in disallowing recovery of postpetition collection expenses from the bankruptcy estate.

A. The Code's Plain Language Does Not Allow Unsecured Creditors to Claim Postpetition Attorneys' Fees.

Travelers correctly points out that the Code adopts an expansive definition of "claim," encompassing any "right to payment." § 101(5)(A). That definition would seem to cover a "right to payment" of postpetition attorneys' fees, even though attorneys' fees are nowhere mentioned in the definition. But claims are allowed only "subject to any qualifying or contrary provisions of the Bankruptcy Code." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000).

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[5] *E.g., Liberty Nat'l Bank & Trust Co. of Louisville v. George*, 70 B.R. 312, 317 (W.D. Ky. 1987); *In re Hunter*, 203 B.R. 150, 151 (Bankr. W.D. Ark. 1996); *Tri-State Homes Inc. v. Mears (In re Tri-State Homes Inc.)*, 56 B.R. 24, 26 (Bankr. W.D. Wis. 1985); *In re Ely*, 28 B.R. 488, 491-92 (Bankr. E.D. Tenn. 1983); *In re Missionary Baptist Found. of Am., Inc.*, 24 B.R. 970, 971 (Bankr. N.D. Tex. 1982). The progenitor of these cases was *United Merchs. & Mfrs. Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs. Inc.)*, 674 F.2d 134 (2d Cir. 1982), which reached that conclusion under the Bankruptcy Act, but interpreted the Code in passing, as well. A leading commentary on bankruptcy supports the minority rule, which is unsurprising, since the author of Travelers' brief also authored the relevant section of the commentary. *See* 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 506.04[3][a][i] (15th ed. rev.).

Travelers inflates the number of courts in this camp, by citing numerous cases that awarded postpetition fees in connection with a debt that was *not dischargeable*. *See* Pet'r Br. at 25 (citing five such cases from courts of appeals). For reasons described below, the holdings of those cases (and of the only other court of appeals case cited by Travelers and decided under the Code) have no bearing on the question whether postpetition collection costs are allowable where, as here, the debt is dischargeable. *See infra* at 40 & n. 18.

One place to look for a qualifier is in § 502(b), the general provision on allowance of claims. That provision is not as clear, or capacious, as Travelers suggests. It provides that the court "shall determine the amount of such claim . . . *as of the date of the filing of the petition.*" § 502(b) (emphasis added). Then it directs the court to "allow such claim *in such amount*, except to the extent" the claim is disallowed either in that subsection or by some other provision of "applicable law." § 502(b) & (b)(1) (emphasis added). Even if Travelers' attorneys' fees claim falls within § 502(b), it is unclear how the allowable "amount of such claim . . . *as of the date of the filing of the petition*" would be anything other than zero.

To be sure, the provision goes on to say that a claim is not disallowed just because it is "contingent." § 502(b)(1). But the Code does not define "contingent." So this allowance provision leaves unanswered yet another key question: Would the drafters have considered an unsecured creditor's future decision whether or not to expend attorneys' fees in the bankruptcy proceeding to be the sort of contingency that could give rise to a recovery (as opposed to just an expense to be borne by the creditor)? It is hard to imagine they would have, in light of the next subsection, which directs the bankruptcy court to "estimate[] for purposes of allowance . . . any contingent . . . claim, the fixing . . . of which . . . would unduly delay the administration of the case." § 502(c). Unlike more conventional contingencies, a claim for postpetition attorneys' fees "as of the date of the filing of the petition" would be utterly incapable of *ex ante* estimation without a crystal ball. *See* Law Profs. at 5, 22.

Thus, even if § 502(b) were read in isolation, it would not be at all clear that any creditor—secured or unsecured—should be allowed to demand a refund of its own postpetition

attorneys' fees in the bankruptcy proceeding just because its contract provided for collection costs.

Any ambiguity is resolved, however, by another provision, § 506(b), which specifically addresses contractual fees, such as attorneys' fees. The relevant text reads:

> (b) *To the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

§ 506(b) (emphasis added).[6] In this provision, Congress specifies that contractual attorneys' fees are allowed only for a creditor whose claim is secured by collateral that is *more valuable* than the debt owed. As most courts have held, this more specific provision means that fees are available only to a so-called "oversecured" creditor, and only to the extent of the creditor's "security cushion"—the amount by which the value of the property exceeds the principal of the claim.

1. Basic principles of statutory construction support the majority rule.

Four points of statutory construction support the majority rule, that unsecured creditors cannot claim postpetition attorneys' fees.

First, the structure of § 506(b) is: "*To the extent that* Condition X is true, Consequence Y shall attach." Normal parlance and elementary rules of logic dictate the obverse—that "[t]o the extent that" Condition X is *not* true,

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[6] Congress has since amended the provision to allow: "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose." 11 U.S.C. § 506(b) (2005) (amendment emphasized). The change has no bearing on the analysis that follows.

Consequence Y shall *not* attach. Any teenager knows that when Mom says, "*To the extent that* you have enough money, you can buy a car," she means the obverse, too: "You cannot buy a car if you don't have enough money," and "You certainly cannot buy a car if you're broke." So, too, with the Code. When Congress said, "*To the extent that*" a creditor is oversecured, "there shall be allowed . . . any reasonable fees . . . provided for under contract," Congress meant the obverse: To the extent that a creditor is not sufficiently secured, its claim for contractual attorneys' fees is not allowed. And the claim is certainly not allowed if the creditor is entirely unsecured.

The implication would be strong enough if Congress had merely declared, "An oversecured creditor's claim for contractual attorneys' fees is allowed." If that were all Congress had said, PG&E would be able to invoke the axiom, *expressio unius est exclusio alterius. See TRW, Inc. v. Andrews,* 534 U.S. 19, 28 (2001). But PG&E's position here is not a matter of negative implication, but of explicit negation. If the point were not so self-evident, it, too, would have a Latin name: *exclusio alterius est exclusio alterius.*

Second, Travelers' reading makes § 506(b) superfluous, which would flout this Court's directive that statutes are to be read to give meaning to every word. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). If all creditors—unsecured, undersecured, and oversecured, alike—*already* had an allowable claim for contractual attorneys' fees by virtue of § 502(b), then § 506(b) would serve no purpose. Surely, Congress did not craft a 67-word provision to give oversecured creditors a right that they—and all other creditors—already had.

Third, neither the definition of "claim" nor § 502(b)'s directive about allowing all claims says anything about attorneys' fees, much less about attorneys' fees sought by contract. In contrast, § 506(b) concentrates on "fees . . .

provided for under [an] agreement," such as the attorneys' fees at issue here. To promote the general implications of § 502(b) over the laser-like specificity of § 506(b) is to violate the precept that the specific trumps the general. *See Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Since a general provision typically yields even when it is couched in seemingly absolute terms, *see Fourco Glass Co. v. Transmirror Prods. Corp.*, 353 U.S. 222, 228-29 (1957), it must be especially pliant where, as here, the general provision is ambiguous and Congress directed that it must yield to any contrary "applicable law." § 502(b)(1).

Fourth, when Congress intended to allow a party to recover attorneys' fees, it said so explicitly. There are at least 15 such circumstances in the Code—five of which entitle a *creditor* to collect attorneys' fees. *See infra* at 43 (cataloging the circumstances). When the Code does provide for fees, it almost always specifies that the fees must be at least reasonable, and typically that they must be necessary. *See infra* at 43-44. Congress's decision not to specify that such a huge class of unsecured creditors would routinely collect attorneys' fees by contract—and not to impose any limitation on the fees—can only mean that Congress did not intend them to. To argue otherwise is to presume that the drafters purposely obscured a mammoth in an anthill. *See Timbers*, 484 U.S. at 373 (rejecting a proposed interpretation of the Code because Congress would not have "obscured" the right sought in a broad and unrelated provision).

2. This Court confirmed this natural reading of the Code in *Timbers*.

This Court confirmed PG&E's reading of the Code in *Timbers*, 484 U.S. at 371-75. The ultimate question before the Court in *Timbers* involved an undersecured creditor's rights under a different provision. *See* § 362(d)(1) (governing the right of a secured creditor to seek "adequate protection" while a stay was in effect). En route to resolving

that question, this Court dissected § 506(b), interpreting it precisely as PG&E does here.

The Court began by observing that "[s]ection 506 of the Code defines the amount of the secured creditor's allowed secured claim and the conditions of his receiving postpetition interest." 484 U.S. at 371. Since "the conditions of his receiving postpetition interest" are the same as the conditions of his receiving "any reasonable fees, costs or charges provided for under the agreement," anything this Court said about the one must apply to the other. The Court drew several conclusions that resolve this case.

First, this Court characterized § 506(b) as a provision that had the "substantive effect of *denying undersecured creditors postpetition interest on their claims*—just as it *denies* oversecured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral." *Id.* at 372 (emphasis changed). The Court reached that conclusion by focusing largely on the first few words of § 506(b), "'*[t]o the extent that*,'" and concluding that these words must mean to that extent and no more. *Id.* Based upon this natural reading, the Court concluded that "this provision permits postpetition interest to be paid *only out of the 'security cushion.*'" *Id.* (emphasis added). That conclusion, in turn, led this Court to hold that "the undersecured creditor, who has no such cushion," cannot collect postpetition interest. *Id.* at 373.

The same analysis applies, *mutatis mutandis*, to attorneys' fees. Just as the emphasized words in § 506(b)—"'*[t]o the extent that*'"—demonstrate that "this provision permits postpetition interest to be paid only out of the 'security cushion,'" the same must be true of postpetition "fees, costs, or charges." *Id.* at 372. Just as § 506(b), therefore, has the "substantive effect of denying undersecured creditors postpetition interest on their claims,"

id., that same language has the "substantive effect of denying undersecured creditors postpetition [fees, costs or charges] on their claims." "[J]ust as [§ 506(b)] denies oversecured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral," *id.*, the same provision has the same effect on postpetition "fees, costs, or charges." And if "the undersecured creditor" cannot collect postpetition interest because it "has no such cushion," *id.* at 373, an unsecured creditor cannot collect postpetition fees either.

In fact, this Court's meticulous examination of § 506(b) applies with even *greater* force here. In *Timbers*, an undersecured creditor was blocked from foreclosing on a property by virtue of bankruptcy's automatic stay, *see* § 362, and the creditor sought compensation for the lost income it would have collected had it been allowed to foreclose and then reinvest the proceeds. 484 U.S. at 368-69. In isolation, the provision the creditor invoked, § 362(d)(1), could plausibly be read to provide such compensation; it affords a secured creditor "adequate protection of an interest in property," which could arguably include protection of the state-law right to foreclose on its collateral in the event of default. This Court rejected the argument, latching onto § 506(b)'s reference to the circumstances under which secured creditors can recover "interest." *Id.* at 372-73. The creditor argued that forgone reinvestment income (which could mean lost income calculated at the prevailing rate of return) is distinct from interest (which could mean interest prescribed by contract). *Id.* at 369. Although this was a plausible basis on which to reconcile the creditor's position with the limitations on "interest" in § 506(b), this Court concluded that the creditor's position "must be regarded as contradicting the carefully drawn disposition of § 506(b)." *Id.* at 373. Travelers' interpretation of the Code presents a contradiction that is more direct. After all, the attorneys'

fees sought here are unambiguously covered in § 506(b)'s reference to "fees"; there is no way to allow Travelers' claim and still give meaning to that word in § 506(b).

There is one difference between the postpetition "interest" this Court was considering in *Timbers* and the postpetition "fees, costs, or charges" it confronts here: The Code elsewhere specifies that a "claim . . . for unmatured interest" is disallowed, § 502(b)(2), but § 502 has no explicit disallowance for attorneys' fees or other costs or charges. But that is no basis on which to distinguish *Timbers*. *See Pride*, 285 B.R. at 375. The creditor's argument in *Timbers* drew upon an independent source of compensation (§ 362(d)), one not negated by § 502(b). Thus, while *Timbers* acknowledged this disallowance provision with a passing citation, *see* 484 U.S. at 372-73, the provision had little bearing on the Court's analysis. The cynosure for the Court was the structure and language of § 506, which treats postpetition interest the same as all other ancillary obligations "provided for under the agreement."

This last point exposes yet another statutory clue of the drafters' intentions: It would have made no sense for Congress to draft a provision purporting to put all these ancillary obligations on the same footing—"interest on such claim, and any reasonable attorneys fees, costs, or charges provided for under the agreement"—if it intended to put them on different footing. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 n.5 (1989) (observing that Congress must have intended to accord the same treatment to each of the expenses addressed in § 506(b)).

Why, then, did the drafters neglect to insert into § 502(b) an express disallowance for postpetition attorneys' fees as it did for unmatured interest? It may be because they believed that § 502(b) already yielded that result by its command to calculate an allowable claim "as of the date of the filing of the petition," § 502(b) or that expenses on attorneys' fees are

simply not "contingent," within the meaning of § 502(b)(1). If so, then the drafters would still have had to expressly exclude unmatured interest in § 502(b), but would have had no reason to do the same with postpetition attorneys' fees.[7] Alternatively, as is explained below, it may be that it never dawned on the drafters that anyone would consider an unsecured creditor's demand for prospective attorneys' fees to be a distinct allowable claim, because no court had treated them as such for the entire 80-year life of the predecessor statute. *See infra* at 30-36, 37-38.

3. Any alternative reading makes no sense.

Most of the courts in the minority camp either predate or ignore *Timbers*. A few, however, address § 506(b), but only by offering a strained reading of its plain language. *See, e.g., New Power Co.*, 313 B.R. 496, 509 (Bankr. N.D. Ga. 2004). According to this contrary position, § 506(b) does not actually authorize oversecured creditors to collect attorneys' fees, as it seems to do (for this theory presumes that § 502(b) does that already). Rather, the theory goes, § 506(b) merely dictates that *when* an oversecured creditor has a contractual right to attorneys' fees (or other costs or charges), those fees, like the underlying debt, are *also* secured. *Id.* This reading

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[7] As the drafters were well aware, it is common for a debtor to sign a note with a face value of, say, $5,000, while the amount actually lent was a lesser sum, say, $4,500. On the first day of the loan, the $500 differential would be *unmatured* interest. The principal would be paid at some stated date in the future, along with the (now *matured*) hidden interest, when the $5,000 note comes due. For any date in between, the $500 of interest could be pro-rated into its matured and unmatured portions. If the face value of every claim were permitted as an allowed claim in § 502(b), then unmatured interest would also be part of the claim. Hence the need for express exclusion of such interest in § 502(b). *See Tex. Commerce Bank, N.A. v. Licht (In re Pengo Indus., Inc.)*, 962 F.2d 543, 546-47 (5th Cir. 1992); H.R. REP. NO. 95-595, at 352-54 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6308-10.

is at war with this Court's analysis of the same provision in *Timbers*. But even on the face of the Code, there would be two problems with this reading.

First, § 506(b) was not necessary to achieve that result either—so it would still be superfluous. To the extent of the security cushion, § 506(b) "allows" to the holder "interest" as well as "fees, costs, or charges" provided for under agreement. Assume, for argument's sake, that such "fees" were *already* allowed under § 502, as Travelers contends. If so, these fees would also be "secured" by operation of § 506*(a)*, the immediately preceding subsection, which provides:

> (a) An allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest . . . in such property, and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. . . .

There would be nothing left for § 506(b) to do.

Second, if § 506(a) did not achieve that end, § 506(b) certainly would not do it. Section 506(b)does not specify one way or the other whether an obligation to pay fees is secured. When the creditor holds "an allowed *secured* claim," *and* the creditor is oversecured, *and* fees are "provided for under the agreement under which such claim arose," then § 506(b) says only one thing about attorneys' fees: "reasonable fees" and other costs "shall be allowed." In short, if, under those circumstances, fees are treated as secured, it is not because § 506(b) makes them so.

Thus, if we were to indulge Travelers' assumption that contract-based attorneys' fees are generally allowable to *all* creditors by virtue of § 502(b), there is no reading of § 506(b) that would save it from the statutory equivalent of an existential crisis. Section 506(b) cannot possibly be there

to make sure an allowed claim is secured; it is there to address obligations that would not otherwise be allowed—or it would serve no purpose at all. Put another way, it is true that, with respect to fees, § 506(b) plays an essential role in honoring the security interest of an oversecured creditor, but § 506(b) is so required *because*, without the provision, the fees would not be allowed at all.

Notably, the § 506 couplet furnishes another revealing clue that Congress does not share Travelers' view that a contractual obligation to pay attorneys' fees is an allowable claim in its own right (courtesy of § 502(b)): Section 506(a) and (b) use the phrase "allowed claim" and "allowed secured claim" to describe the *underlying* obligation. But the drafters pointedly avoided using either simple phrase to describe the obligation to pay attorneys' fees, opting instead for an awkward circumlocution: "there shall be allowed to the holder of *such* claim"—meaning the holder of the underlying "allowed secured claim"—"any reasonable fees . . . provided for under the agreement." This formulation indicates that Congress did not think that either the "interest on *such* claim" or "any reasonable fees, costs, or charges provided for under the agreement under which *such* claim arose" had the status of allowed claims in their own right.

B. The Bankruptcy Code's Structure and Purpose Confirm that Congress Did Not Intend to Allow Unsecured Creditors to Recover Attorneys' Fees.

As this Court pointed out, also in *Timbers*, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." 484 U.S. at 371 (citations omitted). A rule allowing every unsecured creditor with a contract—every credit card company, every noteholder—to bloat its proportional recovery with postpetition attorneys' fees would be incompatible with the

"remainder of the statutory scheme" in almost every conceivable way. One could fill a whole brief describing the depth of the incompatability—and Amici do. *See* Law Profs. at 4-7, 14-23. For this brief, a summary must suffice.

First, a dominant feature of the Code—and bankruptcy policy dating back centuries—is the temporal divide between pre- and postpetition events. It was nearly a century ago that this Court observed, "For more than a century and a half the theory of the English bankrupt[cy] system has been that everything stops at a certain date." *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911). The whole point of a bankruptcy petition is to "freeze . . . the *status quo*." *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993). Numerous Code provisions attach different consequences to an event depending upon whether it occurred pre- or postpetition, fundamentally altering state law rights from the moment the petition is filed. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984); §§ 362 (automatic stay), 547(b) (avoidability of preferential transfers), 549(a) (avoidability of postpetition transactions), 552(a) (postpetition effect of security interest). One provision already discussed illustrates the principle in action: A creditor can assert a claim for interest under a contract—but only up until the petition date. As we have seen, if the creditor is unsecured, the Code cancels any contractual right to interest that would have accrued postpetition. *See* § 502(b)(2). The creditor's state law rights are curtailed even though the "commercial parties" "allocate[d] the burden" of interest payments "contractually . . . and price[d] their goods and services accordingly." Pet'r Br. at 4.

Second, as Travelers acknowledges, ingrained in the Code is the equally venerable bankruptcy "theme of . . . equality of distribution." *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941); *see Bruning v. United States*, 376 U.S. 358, 362 (1964); Pet'r Br. at 46

(citing additional cases). "[I]f one claimant is to be preferred over others, the purpose should be clear from the statute." *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952). That does not mean, as Travelers suggests, that an unsecured creditor's postpetition collection efforts must be treated the same as all sorts of prepetition debts. *See* Pet'r Br. at 45-46, 49. "[E]quality among creditors" is measured "as of the date of insolvency," which is why (to continue with the same illustration) "interest accruing thereafter is not considered." *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 411 (1938). Thus, equality means that, as of the petition date, unsecured creditors share and share alike. It also means that an unsecured creditor cannot "improve his position vis-à-vis other creditors by action taken by him postpetition." *In re Cotton Mktg., Inc.*, 737 F.2d 1338, 1342 (5th Cir. 1984).

Travelers' proposed rule would violate this principle by giving one large subclass of unsecured creditors free rein to inflate its claim or voting power relative to all others. Contrary to Travelers' assertion, this rule does not "promote[] equality of distribution among creditors," Pet'r Br. at 45, any more than primogeniture promotes equality of distribution among sons. *See* Law Profs. at 17-18.

Third, largely for the foregoing two reasons, and also to maximize the estate, the Code adheres to the longstanding bankruptcy policy of never allowing an unsecured creditor to collect its postpetition attorneys' fees from the estate unless the creditor is acting for the benefit of the estate (and all the other creditors). § 503(b)(3)-(4) (codifying *Randolph & Randolph v. Scruggs*, 190 U.S. 533, 539 (1903) ("We are not prepared to go further than to allow compensation for services which were beneficial to the estate.")). Because Travelers was acting to advance only its own interests, it has no right to collect its "administrative expenses." § 503. Travelers cannot create such a right by dressing them up as

"contingent" claims allowable under § 502. *See* Law Profs. at 11-12 (citing numerous cases).

Finally, as Travelers points out, the Code revolves around the "twin goals of maximization of realization on creditors' claims and of prompt and efficient administration of the estate." Pet'r Br. at 47 (internal quotation marks and citations omitted). Allowing unsecured creditors to claim postpetition attorneys' fees would defeat both these goals. As noted above, fee-shifting provisions are ubiquitous. *See supra* at 13. Amici describe the feeding frenzy that will ensue if every unsecured creditor with a fee-shifting provision could enhance its recovery by incurring attorneys' fees, consuming the estate along the way and overwhelming courts with a veritable avalanche of ancillary litigation over the meaning of fee provisions and the reasonableness of fees. Law Profs. at 18-21. Contractual debts that would otherwise have been the easiest sorts of claims to quantify will now be the most illiquid and controversial.

This case provides a most unpalatable glimpse of the world according to Travelers: The underlying debt in this case was $0.00. Yet the creditor presented the debtor with a $167,000 claim for attorneys' fees for its intermeddling. The debtor had to pay about the same amount to its own lawyers to respond. Both parties have expended many multiples of that amount litigating over the nature and amount of the attorneys' fees obligation, at four levels of the federal judiciary. If Travelers prevails here, the litigation will not be over; the parties will continue to litigate over the meaning of the attorneys' fees provision in these contracts and over what was reasonable. *See Sakowitz*, 110 B.R. at 275. When that is done, the creditor will almost certainly present the debtor with a bill for all the appeals—and the parties will then start anew, litigating over the debtor's obligation to pay *that* bill. If this scenario becomes the norm, administration of the estate will be neither prompt nor efficient, and bankruptcy

lawyers will gorge themselves on the estate, leaving little to split among the creditors.

None of these concerns applies to oversecured creditors. When a creditor bargains to secure a debt with specific property, the creditor has a property interest as a lienholder in that asset, effectively putting the property out of reach of all other creditors—and essentially out of the reach of the estate itself unless and until the secured creditor is fully repaid. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 588 (1935). The secured creditor, then, begins with a position that is superior to the position of unsecured creditors, and the Code honors that preferred position—eschewing equality with unsecured creditors—up to the value of the collateral. *See* § 506; *Timbers*, 484 U.S. at 374. Thus, the rights of secured creditors routinely breach the temporal divide. *See infra* at 32-36 (discussing *Security Mortgage*). Precisely because the collateral is already out of reach of other creditors, the secured creditor is not enlarging its share of the estate vis-à-vis other creditors when it collects postpetition fees and interest. Moreover, because secured creditors are typically less numerous than unsecured creditors and limited by the value of their collateral, allowing them to collect fees does not raise the same concerns about administration or depletion of estate assets.

In sum, the consequences of the rule Travelers proposes—putting unsecured creditors on a par with secured creditors with respect to fees—are so antithetical to the Bankruptcy Code's rudiments that a court would be tempted to find a way to avoid the result even if the Code had clearly prescribed it. But since Travelers' position is built on congressional silence about attorneys' fees in one ambiguous provision and defies the explicit direction of another, language and sound policy align against Travelers' position.

C. History Confirms that Congress Did Not Intend to Award Postpetition Attorneys' Fees to Unsecured Creditors.

History, too, confutes Travelers' reading of the Code. The parties agree that this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990); *see* Pet'r Br. at 43. But Travelers' account of the history elides the critical point, that the historical rule was the one now reflected in § 506(b): Oversecured creditors can recover attorneys fees; unsecured creditors cannot. In light of that backdrop, it would have been anathema for the drafters to grant attorneys' fees to an unsecured creditor—which could explain why the drafters did not bother (or think) to insert a specific disallowance into § 502(b).

Early Bankruptcy Act. As far back as one might care to look, the rule was that an unsecured creditor could not claim attorneys' fees, even if provided by contract. In one of its first cases under the Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (repealed 1979), this Court confronted a prepetition contract in which the debtor promised to pay the creditor's postpetition attorneys' fees. *See Randolph*, 190 U.S. at 538; Law Profs. at 9-10 (discussing *Randolph*). In *Randolph*, this Court disallowed a contractual claim for the unsecured creditor's postpetition attorneys' fees, except "so far as they benefited the estate" (the same rule that persists in the modern Code today). 190 U.S. at 539-40; *see* § 503(b) (codifying *Randolph*).

For the early decades of the Act, *no creditor* could recover postpetition attorneys' fees prescribed by contract—

whether unsecured[8] or secured.[9] The Bankruptcy Act reached that result by limiting claims to "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition." Bankruptcy Act § 63(a), 11 U.S.C. § 103(a)(1) (1934 & Supp. III 1937) (repealed 1979). So if a right to attorneys' fees accrued prepetition, the fees were recoverable in bankruptcy, *see Merchant's Bank v. Thomas*, 121 F. 306, 312 (5th Cir. 1903), but where the attorneys' fees had not accrued at the time of the filing of the petition, "the fees did not become, within the purview of section 63, a provable debt against the estate of the bankrupt." *T.H. Thompson*, 144 F. at 315; *see Gebhard*, 140 F. at 573 (on the petition date "[t]he obligations of the bankrupt were then fixed, and his estate could not be charged by that which subsequently occurred").

Congress enlarged the scope of "provable claims" in 1938. As Travelers points out, *see* Pet'r Br. at 43 n.9, this amendment meant that a creditor could also prove certain "contingent debts and contingent contractual liabilities."

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[8] *See, e.g., Merchant's Bank v. Thomas*, 121 F. 306, 309 (5th Cir. 1903); *McCabe v. Patton*, 174 F. 217, 219 (3d Cir. 1909); *In re Keeton, Stell & Co.*, 126 F. 426, 428 (W.D. Tex. 1903); *In re Gebhard*, 140 F. 571, 573 (M.D. Pa. 1905); *In re T.H. Thompson Mill Co.*, 144 F. 314, 315 (W.D. Tex. 1906); *In re Edens Co.*, 151 F. 940, 941 (D.S.C. 1907); *In re Harris*, 272 F. 351, 352 (M.D. Pa. 1921).

[9] *See In re Roche*, 101 F. 956, 960 (5th Cir. 1900); *Mechanics'-Am. Nat. Bank v. Coleman*, 204 F. 24, 32 (8th Cir. 1913); *British & Am. Mortgage Co. v. Stuart*, 210 F. 425, 428-30 (5th Cir. 1914); *In re Gimbel*, 294 F. 883, 885-86 (5th Cir. 1923); *First Sav. Bank & Trust Co. v. Stuppi*, 2 F.2d 822, 824-25 (8th Cir. 1924); *In re Garlington*, 115 F. 999, 1000 (N.D. Tex. 1902); *In re Hershey*, 171 F. 1004, 1008 (N.D. Iowa 1909); *In re V. & M. Lumber Co.*, 182 F. 231, 239 (N.D. Ala. 1910); *In re Ledbetter*, 267 F. 893, 895-96 (N.D. Ga. 1920) (secured creditor's attorneys' fees and costs incurred prepetition are provable; those incurred postpetition are not).

Bankruptcy Act § 63(a)(8), 11 U.S.C. § 103(a)(8) (1976) (repealed 1979). But the key question under the Act (as under the Code) was whether the claim was "allowed," and Travelers neglects to mention that the Act still made clear "[t]hat an unliquidated or contingent claim shall not be allowed" where "it is not capable of liquidation or of reasonable estimation" "within the time directed by the court." *Id.* § 57(d), 11 U.S.C. § 93(d) (1976) (repealed 1979). Postpetition attorneys' fees obviously fail this test, and no case in the ensuing four decades leading up to the adoption of the Code ever held otherwise.[10]

Security Mortgage. Travelers correctly points out that this Court's decision in *Security Mortgage Co. v. Powers*, 278 U.S. 149 (1928), changed some of the rules. *See* Pet'r Br. at 43. But the rules changed only for *oversecured* creditors, not for unsecured creditors.

Security Mortgage involved an *over*secured creditor that claimed a right to postpetition fees under a state statue. 278 U.S. at 152-54. The Court agreed that an oversecured creditor could claim attorneys' fees. In so holding, the Court did not overrule *Randolph*, nor even mention the case, for it was evident that the *Security Mortgage* analysis was inapplicable to unsecured creditors. The Court began its analysis by observing that "[u]nder section 67 of the Bankruptcy Act *the trustee takes property subject to valid liens* existing at the time of the institution of the bankruptcy

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[10] Before Congress adopted the Code, the only suggestion to that effect was dictum in a single Ninth Circuit case. *See Hartman v. Utley*, 335 F.2d 558, 559 (9th Cir. 1964). The Ninth Circuit *disallowed* a postpetition claim for attorneys' fees by an unsecured creditor. *Id.* at 560-61. Along the way, the Ninth Circuit expressed the view that the 1938 Amendment would allow such a claim in other circumstances. Not a single published decision, within the Ninth Circuit or anywhere else, followed, or even cited, that dictum before 1978, when Congress enacted the Code.

proceedings." *Id.* at 153 (emphasis added). This meant that any property that was subject to a lien was simply outside the estate—out of the reach of other creditors—and, thus, not subject to the Act's restrictions on claims against the estate. *See In re Bain*, 527 F.2d 681, 686-87 (6th Cir. 1976). That was why the Court emphasized that "the [secured creditor] does *not* seek to prove the claim *in bankruptcy*. It asks to have it allowed as a part of the principal debt, which is *secured by a lien* upon the property sold." 278 U.S. at 153 (emphasis added).[11]

In other words, the question before the Court was not whether the creditor had a separate claim for attorneys' fees that was provable in the bankruptcy proceeding. The question under the Act was what state law considered to be the size of the debt that was secured by the lien and what amount was, therefore, outside the debtor's estate. *See Sakowitz*, 110 B.R. at 271; *see also James Talcott, Inc. v. Wharton (In re Cont'l Vending Mach. Corp.)*, 543 F.2d 986, 992 (2d Cir. 1976). The Court emphasized the point repeatedly, observing that the issue was the "[t]he *validity of the lien* claimed by the mortgage company for attorney's fees," 278 U.S. at 153 (emphasis added), and characterizing the claim as one "that . . . may be enforced *against the land held as security*," *id.* at 154 (emphasis added).

Nothing changes for unsecured creditors. In the intervening half century—after this Court decided *Security*

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[11] These clear statements are not negated by the Court's subsequent, rather imprecise, comment that "the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, either as a *provable claim* or by way of a lien." 278 U.S. at 154 (emphasis added). The case before the Court had nothing to do with a "provable claim." *See Sakowitz*, 110 B.R. at 271. And at the time, as we have seen, there was no doubt that a claim that was either unliquidated or contingent was *not* provable.

Mortgage and before Congress adopted the Code—the lower courts hewed to this limited view of *Security Mortgage*.[12] The courts did not apply the *Security Mortgage* result to unsecured creditors, because unsecured creditors most certainly *were* making claims against the estate. *See In re Glenn*, 2 F. Supp. 579, 593 (W.D.S.C. 1932) ("So far as attorneys' fees being a claim against the general estate as distinguished from the specific property covered by the various mortgages, these fees are allowable as a claim only where they were placed in the hands of the attorney prior to bankruptcy."). While one or two courts in that timeframe may have been confused about the extent to which the *Security Mortgage* rule could be applied to secured creditors who were *under*secured,[13] not a single court over the ensuing half century invoked *Security Mortgage* for the proposition

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[12] *See In re Am. Motor Prods. Corp.*, 98 F.2d 774, 775 (2d Cir. 1938) ("[Creditor] is not seeking to prove any claim in bankruptcy but merely to have the amount of an agreed counsel fee allowed as part of the principal debt covered by a lien on the property sold."); *Bain*, 527 F.2d at 685 ("The fee at issue here is not a claim against the estate; it is a part of a debt secured by deeds of trust."); *In re Cont'l Vending Mach.*, 543 F.2d at 993 ("'The appellee here is not seeking to prove any claim in bankruptcy but merely to have the amount of an agreed counsel fee allowed as part of the principal debt covered by a lien on the property sold.'" (citations omitted)); *In re Mill City Plastics*, 129 F. Supp. 86, 91 (D. Minn. 1955) (finding, based on *Security Mortgage*, that "value of [attorneys' fees] are allowable, not as a provable claim, but as part of the principal debt which is also secured by a lien upon the property sold"); *In re Schafer's Bakeries*, 155 F. Supp. 902, 912 (E.D. Mich. 1957) ("claim for attorney fees and expenses became a part of the original debt secured by valid liens").

[13] *See In re Ferro Contracting Co.*, 380 F.2d 116, 120 (3d Cir. 1967) (allowing a secured creditor who was undersecured to collect attorneys' fees, without revealing whether the fees were incurred pre- or postpetition); *LeLaurin v. Frost Nat'l Bank of San Antonio*, 391 F.2d 687, 691 (5th Cir. 1968) (allowing a secured creditor who was undersecured to collect attorneys' fees, without addressing why such fees were allowed under the Bankruptcy Act).

that a completely *un*secured creditor could collect attorneys' fees under a contract. So far as appears from published cases before Congress enacted the Code, neither the courts nor the litigants even considered the point arguable.[14]

Thus, if the drafters of the Code had scoured the published cases, they would have found the two categories of cases Travelers invokes: (1) numerous cases in which *secured* creditors (almost entirely *over*secured creditors) collected *post*petition attorneys fees;[15] and (2) cases in which creditors of all sorts collected *pre*petition attorneys fees.[16] These are the only categories of pre-Code cases Travelers cites when it announces that "[f]ollowing this Court's decision in *Security Mortgage*, courts routinely allowed

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[14] Four years *after* Congress passed the Code, the Second Circuit granted postpetition fees to an unsecured creditor in a case arising under the Bankruptcy Act. *United Merchs.*, 674 F.2d at 138-39. Even so, the court did not question the district court's observation that "not a single decision has been found allowing an unsecured creditor to assert . . . a claim" for postpetition attorneys' fees. *In re United Merchs. & Mfrs., Inc.*, 10 B.R. 312, 314 (S.D.N.Y. 1981), *rev'd*, 674 F.2d 134 (2d Cir. 1982). In any event, the Code's drafters would not have known about this case nor about the several cases that followed its incorrect rendering of *Security Mortgage*. *See also Worthen Bank & Trust, N.A. v. Morris*, 602 F.2d 826, 829 (8th Cir. 1979) (post-Code case, granting attorneys' fees to an undersecured creditor under the Act, without analyzing Code).

[15] *In re Cont'l Vending Mach.*, 543 F.2d at 993 (creditor was secured and therefore was "not seeking to prove any claim in bankruptcy but merely to have the amount of an agreed counsel fee allowed as part of the principal debt covered by a lien on the property sold" (internal quotation marks and citation omitted)); *LeLaurin*, 391 F.2d at 691; *Ferro*, 380 F.2d at 119-20; *Am. Motor Prods.*, 98 F.2d at 775; *Schafer's Bakeries*, 155 F. Supp. at 912.

[16] *See Mills v. E. Side Investors (In re E. Side Investors)*, 702 F.2d 214, 215 (11th Cir. 1983) (case decided *after* enactment of the Code, and involving a *secured* creditor, holding that "[t]he filing of a petition . . . does not diminish the debtor's obligation for attorney fees *if vested when the petition is filed*" (emphasis added)).

claims for attorneys' fees if the creditor was entitled to fees under applicable state law." Pet'r Br. at 43; *see also id.* at 42 (same). This assertion is about as helpful as an apostate's plea to Saint Peter that "God routinely lets souls into heaven." Technically accurate, but hardly persuasive.

The Code. In light of this backdrop, a shift to a rule that unsecured creditors can collect their contractual attorneys' fees postpetition would have been nothing short of tectonic. If the drafters had intended such a shift, one would expect that they would have made their intention explicit. *See Davenport*, 495 U.S. at 563. Moreover, if Congress intended to risk depleting estates and overwhelming courts with a flood of litigation over fees, to blur the traditional line between pre- and postpetition, to abandon the rule that unsecured creditors could never garner fees without benefiting the estate, and to toy with the usual rules of equality of distribution, *see supra* at 25-28, at the very least *someone* would have explained why that might be a good idea, or at least mentioned that it was happening.

Instead, Congress codified the existing rule in § 506(b), which reflects the double-edged allowance for oversecured creditors and disallowance for others. *See* H.R. REP. NO. 95-595, at 356-57 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6312 (interpreting § 506(b) as "codif[ying] current law by entitling a creditor with an oversecured claim to any reasonable fees, costs, or charges provided under the agreement under which the claim arose"). And the legislative history provides not a hint that any more fundamental change was in the offing. No Member of Congress, no Senator, and no committee so much as

suggested that the venerable rule for unsecured creditors should or would be changed.[17]

Travelers correctly points out that one of the Code's major innovations was an expansive definition of the word "claim." § 101(5); *see* Pet'r Br. at 43 n.9. The purpose was not to expand creditors' rights, but to reach a more comprehensive resolution of the debtor's outstanding liabilities. The all-embracing definition meant that a much broader range of debts and potential debts could be canceled—"discharged," in the Code's parlance—when the bankruptcy case ended. *See* §§ 524, 1141(d). Even debts that are contingent upon the filing of the petition, and never mature during bankruptcy proceeding, are now discharged. So, too, are debts that cannot easily be estimated. § 502(c).

This legislative backdrop provides one further explanation of why Congress did not tack onto § 502(b) a more explicit disallowance for postpetition attorneys' fees, as it did, for example, for "unmatured interest." § 502(b)(2). One explanation, already mentioned above, is that the drafters thought it unnecessary. *See supra* at 22-23. An alternative explanation is that the drafters did not conceive of the possibility that, technically, the expanded definition of "claim" could be read to encompass contractual obligations to pay attorneys' fees. Such a lapse might be mystifying i

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[17] The debate over bankruptcy reform lasted ten years. The legislative history is splayed over 17 volumes, *see Bankruptcy Reform Act of 1978: A Legislative History* (Alan N. Resnick & Eugene M. Wypyskii eds., 1979), with a commission study, three committee reports, and thousands of pages of floor debate. PG&E has searched the history and discovered not a single reference to the concept of allowing unsecured creditors to recover postpetition attorneys' fees by contract. *See, e.g.*, H.R. REP. No. 95-595, at 308-09, 356-57 (1997), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6265-66, 6312-13 (analysis of § 101 definition of "claim" and § 506); S. REP. No. 98-989 at 21, 62-65, 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08, 5848-51, 5854 (same).

courts had been routinely doling out postpetition attorneys' fees to unsecured creditors when the drafters were doing their handiwork, or even if the issue had been the subject of extensive pre-Code litigation, or discussion among the drafters, as unmatured interest was. *See supra* at 22-23 & n.7. But since not a single court allowed such a claim for the entire 80-year life span of the predecessor statute—or before—the lapse (if that's what it was) is at least explicable. Whatever the explanation, Congress did not speak with anywhere near the clarity that would be necessary to upend centuries of bankruptcy practice and to undermine bankruptcy policy so thoroughly.

D. None of this Court's Precedents Supports the Conclusion that Unsecured Creditors Can Assert a Claim for Postpetition Attorneys' Fees.

For precedential support Travelers relies mainly on *Security Mortgage*. It argues: "[A]s the Court explained long ago in *Security Mortgage*, Congress has elected not to prohibit *recovery in bankruptcy* of an *unsecured* claim for attorneys' fees that is valid under state law." Pet'r Br. at 28 (emphasis changed). As noted immediately above, *see supra* at 32-36, the statement is doubly false. First, *Security Mortgage* had nothing at all to say about "an unsecured claim," and its rationale was valid only for oversecured claims. Second, the whole point of the case was that the oversecured creditor was simply not making a "recovery in bankruptcy." *See, e.g.*, *Sakowitz*, 110 B.R. at 271.

Travelers' reliance on *Cohen v. de la Cruz*, 523 U.S. 213 (1998), is even more misplaced. *See* Pet'r Br. at 24-25. That case was not about the interplay between § 502(b) and §506(b). It was not even about whether a claim for postpetition attorneys' fees is generally *allowable*, under contract or otherwise. The case was about § 523(a), which dictates the circumstances under which a debt cannot be *discharged* from bankruptcy—i.e., when the liability

survives the bankruptcy, and the debtor remains liable for the entire debt even after the bankruptcy case is over. *See* 523 U.S. at 214-15. The specific provision at issue dictates that a liability will not be discharged "to the extent obtained by . . . actual fraud." § 523(a)(2)(A). The question before the Court was whether this provision would prohibit discharge also of a fraud-related liability for treble damages, attorneys' fees, and costs. 523 U.S. at 215.

The Court held "that § 523(a)(2)(A) prevents the discharge of all liability arising from fraud, and that an award of treble damages therefore falls within the scope of the exception." *Id.* Having decided that knotty issue of statutory construction, the Court concluded that any "attorney's fees and costs" that were appended to the liability also had to be "nondischargeable in bankruptcy." *Id.* at 223.

Travelers asserts that this conclusion was tantamount to "holding . . . a creditor's claim for attorneys' fees properly constitutes an *allowable* 'claim' in a debtor's bankruptcy case." Pet'r Br. at 25 (emphasis added). That is a non sequitur. When a bankruptcy court encounters a potential liability that may not be discharged, it treats that particular claim as if no bankruptcy petition had ever been filed. *See In re Williams*, 227 B.R. 589, 593 (D.R.I. 1998). If the creditor would have been entitled to recover ancillary charges (whether attorneys' fees or interest) for prevailing on the claim outside the bankruptcy proceeding, under nonbankruptcy law, the creditor can recover those charges as part of the judgment in the bankruptcy court. *See Leeper v. Pa. Higher Educ. Assistance Agency*, 49 F.3d 98, 101-03 (3d Cir. 1995) (while § 502(b)(2) bars claims for unmatured interest against the estate, it does not preclude accrual of interest on nondischargeable debts). That is all *Cohen* held. That does not translate into a rule that attorneys' fees are always allowable claims for unsecured creditors where, as here, the underlying claim *is* dischargeable. *See Deutsche*

Fin. Servs. Corp. v. Osborne (In re Osborne), 257 B.R. 28, 34 n.3 (Bankr. C.D. Cal. 2000) ("*Cohen* does not affect" attorneys' fees determinations in "cases involving non-523(a) issues").

For this same reason, Travelers is incorrect when it tallies up a series of court of appeals cases in support of the proposition that postpetition attorneys' fees are generally allowable to unsecured creditors by contract. *See* Pet'r Br. at 25. Almost every court of appeals case Travelers cites in support of its position on the merits (and cited at the cert. stage in support of the assertion of a circuit conflict) falls into the *Cohen* mold: They involved fees attached to a judgment of liability, where the underlying judgment, and hence the contractual or statutorily prescribed fees, were held to be *nondischargeable*.[18] *See* Law Profs. at 16-17 & n.11.

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[18] In support of its position, Travelers cites only six court of appeals cases interpreting the Code (as opposed to the Act). Five of them fall into this category. *See Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998) (creditor's "attorney's fees were properly included in the nondischargeability debt under § 523(a)(2)(A)"); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991) ("where a party has contracted to pay attorneys' fees for the collection of a nondischargeable debt, the fees also will not be discharged in bankruptcy"); *Transouth Fin. Corp. v. Johnson*, 931 F.2d 1505, 1508-09 (11th Cir. 1991) ("Once a debt has been determined nondischargeable, a creditor's attorney's fees, if provided for by contract, are included as part of the nondischargeable debt."); *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 227 (5th Cir. 1991), *overruled on other grounds by Coston v. Bank of Malvern*, 991 F.2d 257 (5th Cir. 1992); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1167-68 (6th Cir. 1985) ("523(a)(2)(B) excepts from discharge the whole of any debt incurred by use of a fraudulent financial statement, and such a debt includes state-approved contractually required attorney's fees").

The sixth one, *Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999), was also governed by a different provision. It involved a situation in which a creditor incurred attorneys' fees in connection with a bankruptcy and the debtor then

E. The Court Should Resolve this Controversial Question of Statutory Interpretation, Even Though It Was Not Addressed Below.

Because *Fobian* was the controlling law, PG&E did not assert this broader statutory argument below. For four reasons, this Court should address the issue now, rather than sending the case back to the Court of Appeals to consider the argument. First, it would have been futile for PG&E to raise the argument, since *Fobian* unequivocally required disallowance of Travelers' claims for attorneys' fees here for litigating pure issues of bankruptcy law—and gave unsecured creditors the right to seek attorneys' fees in most other circumstances. The Bankruptcy Court, the District Court, and the Ninth Circuit panel all lacked the authority to overrule that longstanding authority. Second, as noted above, the issue is not only fairly included in Travelers' Question Presented, but is the keystone of Travelers' brief. *See supra* at 12-13 & n.3. Third, the narrower statutory argument—about Travelers' entitlement to fees under these specific circumstances—is squarely presented and preserved, and, indeed, was addressed by the Court of Appeals. *See* PA 3a. But, as we shall see momentarily, the answer to that question depends upon, and flows from, analysis of this broader issue of statutory interpretation. Fourth, the issue, as we have shown, has fully percolated among the lower courts

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formally *assumed* a lease. When that occurs, the debtor must accept all the contract's terms, including a provision requiring reimbursement of attorneys' fees. *See* § 365(a). In fact, the Code will not allow the debtor to assume the lease *unless* the debtor "cures" any "default." § 365(b)(1)(A). A seventh case—which was uncritically adopted by most of the subsequent cases in the minority camp—was actually decided under the Bankruptcy Act, albeit too late for the Code's drafters to have known about it. *See United Merchs.*, 674 F.2d at 136-40.

for more than two decades and they are hopelessly split. *See supra* at 14-15 nn.4-5.

In sum, there is no reason to remand the case to the Court of Appeals to address this purely legal issue.[19]

II. TRAVELERS CANNOT CLAIM FEES FOR ACTIVITIES THAT WERE NOT REASONABLY NECESSARY TO PROTECT ITS RIGHTS.

Even if the Code permits unsecured creditors to recover postpetition attorneys' fees by contract, the Court of Appeals' denial of fees must still be affirmed. If there is a statutory entitlement to fees, it is subject to a reasonableness limitation. *See infra* Point II.A. All three courts below correctly found that Travelers' activities were not reasonably necessary to preserve its rights. *See infra* Point II.B. As the Court of Appeals held, and PG&E argued throughout the litigation (including in its opposition to certiorari), the Code simply does not permit "unimpaired, non-prevailing creditors ... to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims," for if it did, "the system would likely be overwhelmed by fee applications, with no funds available for

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[19] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 n.7 (1984) (considering "petitioner's presentation of their ... challenge for the first time before this Court" because an intervening decision changed the controlling law after cert. petition filed); *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951) (addressing argument raised for the first time on appeal, where "[t]hese grounds raise only issues of law not calling for an examination ... of evidence"), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *see also Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587-88 (1970) (Black, J., dissenting, in 4-4 split) (three factors control whether to consider issues not raised below: "first, whether there has been a material change in the law; second, whether assertion of the issue earlier would have been futile; and third, whether an important public interest is served by allowing consideration of the issue").

disbursement to impaired creditors or debtor reorganization." PA 3a.

A. Any Unsecured Creditor's Claim for Contractual Attorneys' Fees Must At Least Be Reasonable.

As we have seen, Travelers' argument that unsecured creditors can recover attorneys' fees rests on a hyper-literal reading of an ambiguous general provision that has nothing to do with fees. Since Congress did not mention attorneys' fees—and may not even have thought of attorneys' fees when it crafted § 502(b)'s general language, *see supra* at 22-23, 37-38—it omitted the customary limits on attorneys' fees.

Had Congress expected the courts to interpret the Code as Travelers urges, it would undoubtedly have insisted that any fees must be disallowed unless they were necessary to protect the creditor's rights, or at least reasonable. That is what Congress did every single time it expressly awarded attorneys' fees to a creditor. The most common basis for awarding attorneys' fees to a creditor is where the creditor has performed some important service, whether for the estate or for other creditors. *See generally* Law Profs. at 9-12. Thus, for example, a creditor can seek attorneys' fees for "recovering . . . for the benefit of the estate any property transferred or concealed by the debtor," § 503(b)(3)(B); for seeking "damages on behalf of the debtor" against a "bankruptcy petition preparer" who committed fraud, § 110(i)(2); for assisting "with the prosecution of a criminal offense relating to the case or to the business or property of the debtor," § 503(b)(3)(C); for "making a substantial contribution," in certain sorts or bankruptcy cases, § 503(b)(3)(D); or for forcing a debtor into a bankruptcy proceeding involuntarily, § 503(b)(3)(A).

In each of these circumstances, Congress strictly limited the fees. It did not simply require that the fees be

"reasonable . . . based on the time, the nature, the extent, and the value of such services, and the cost of comparable services." § 503(b)(4) (specifying fees available for attorneys performing services described in § 503(b)(3)(A)-(D)). Congress went even further and denied attorneys' fees for any activity unless the creditor could show that the activity was "necessary" to achieve the prescribed goal. *Id.* The only other circumstance where a creditor is expressly granted the right to receive attorneys' fees is in the context of § 506(b), where the fees must be "reasonable."

Expanding the focus more broadly to other circumstances where the Code allows *any party* to collect attorneys' fees from any another, the same pattern emerges. Virtually every time, the fees are subject to either the same "necessary" and "reasonable" constraint noted above, *see* §§ 503(b)(3)(E)-(F), or the fees must at least be "reasonable," §§ 303(i)(1)(B), 523(d).

Congress could not have intended to accord better treatment to unsecured creditors than to oversecured ones (who cannot seek contractual fees unless they are reasonable). Nor could Congress have intended to elevate unsecured creditors who are protecting their own interests—and even, on Traveler's theory, who deplete the estate's assets without any benefit to anyone—over creditors who take heroic measures to increase the resources available to all.

To read the Code this way would fly in the face of the axiom "'that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'" *Johnson v. United States*, 529 U.S. 694, 707 n. 9 (2000) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). This Court has not hesitated to read a reasonableness requirement into statutes in the past, when necessary to effectuate Congress's intent—even in cases where Congress had not

signaled its intention to adopt such a limit in a dozen parallel provisions, as it did here.[20]

Indeed, in *Security Mortgage*, the case on which Travelers most heavily relies, this Court did exactly that. As we have seen, the case involved an oversecured creditor that sought to recover postpetition attorneys' fees. 278 U.S. at 152. The creditor incurred the fees in a parallel proceeding that it brought in state court after the debtor had filed its bankruptcy petition. *Id.* at 151-52. In addition to unsuccessfully resisting a general right to collect postpetition attorneys' fees on statutory grounds, *see supra* at 32-33, the bankruptcy trustee also resisted the fees on the ground that the creditor's collection action was unnecessary:

> It is asserted that the suit [by the creditor] . . . was brought, not for the purpose of collecting the debt, but solely for the purpose of enhancing [by the amount of the attorneys' fees] the amount which was obtainable

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[20] *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) (holding that statutorily authorized union representatives owe a duty of reasonableness—which is violated only if the representative's conduct "can be fairly characterized as so far outside a 'wide range of reasonableness[]' that it is wholly irrational or arbitrary"—even though the literal terms of the National Labor Relations Act impose a more rigorous duty (citation omitted)); *United States v. Witkovich*, 353 U.S. 194, 200 (1957) (reading a reasonableness limitation into a provision of the Immigration and Nationality Act that purported to permit the Attorney General to elicit all information he deemed "fit and proper" from an alien, holding that "assuredly, Congress did not authorize . . . [the Attorney General] to elicit information that could not serve as a basis for confining an alien's activities"); *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 462 (1937) (reading a provision of the Bankruptcy Act, which purported to give a bankrupt mortgagor a stay of all proceedings against him or his property for three years, "as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period").

> without suit, through the lien upon the proceeds of the property.

278 U.S. at 159. "If this is true," the Court observed, "the statutory provision designed for the protection of the debtor was employed solely as a means of oppression." *Id.* The Court found the trustee's objection "meritorious if sustained by the facts" and ordered that "the credit for attorney's fees shall be disallowed," if the allegation proved to be truthful. *Id.*

This Court did not tether this reasonableness requirement to any explicit provision of the Act. It did not need to, presumably because it was so clear that Congress would never have authorized a creditor to recover attorneys' fees for activities that were unnecessary to collect a debt and that served no purpose other than to increase the creditor's take vis-à-vis other creditors or to waste the resources of other participants in the bankruptcy proceeding. In keeping with this principle, even courts that have concluded that unsecured creditors may collect their postpetition attorneys' fees under contract have concluded that the creditors are not "'entitled to reimbursement for [legal] services that were unnecessary or unconnected with enforcement or collection of the indebtedness.'" *United Merchs.*, 674 F.2d at 140 (quoting *In re Cont'l Vending Mach.*, 543 F.2d at 994). Even the progenitor of all the cases on which Travelers relies held that "[a] rule of reason must be observed" in order to prevent contractual attorneys' fees clauses from "becoming a tool for wasteful diversion of an estate at the hands of . . . creditors who, knowing that the estate must foot the bills, fail to exercise restraint in enforcement expenses." *Id.* at 139 (citations omitted).[21]

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[21] *See also Cable Marine v. M/V Trust Me II*, 632 F.2d 1344, 1345 (5th Cir. 1980) (invoking equitable principles in declining to award fees in the

B. All Three Courts Below Correctly Found that Travelers' Activities in the Bankruptcy Proceeding Were Not Reasonably Necessary to Preserve Its Rights.

Unlike in *Security Mortgage*, there is no need here to remand for a determination of whether Travelers' activities were reasonably necessary to protect its rights or "for the purpose of collecting the debt." *Security Mortgage*, 278 U.S. at 159. As all three courts below agreed "[n]othing in the federal bankruptcy proceedings required Travelers to satisfy any of the obligations assured by, or to make any payment with respect to, any of its surety bonds or indemnity agreement with [PG&E]." PA 2a. There simply was no debt to collect, and no right to protect, just an "unimpaired inchoate and contingent claim[]." PA 3a. Travelers has never cited a single case in which a creditor was allowed to claim naked attorneys' fees, shorn from any underlying debt. More importantly, all three courts found that the activities were all utterly unnecessary to preserve any of Travelers' contingent rights. In a lengthy exchange with Travelers counsel, the Bankruptcy Court methodically demolished every one of Travelers' arguments as to why its actions were reasonably necessary to protect its interests. *See* JA 133-134, 139, 141-43. The District Court reiterated the view that Travelers faced no threat to any of its rights. *See* PA 18a-19a. And the Court of Appeals, too, characterized Travelers as an "unimpaired, non-prevailing creditor[]," emphasizing

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face of contractual provisions awarding them); *In re Keaton*, 182 B.R. 203, 209 (Bankr. E.D. Tenn. 1995) ("[T]he bankruptcy court has an independent power to limit . . . fees to a reasonable amount."), *aff'd*, 212 B.R. 587 (E.D. Tenn. 1997), *vacated as moot*, 145 F.3d 1331 (6th Cir. 1998); *In re Huhn*, 145 B.R. 872, 875 (W.D. Mich. 1992) (bankruptcy courts are responsible for preventing the waste of estate assets by overreaching attorneys seeking fees from the estate).

that "Travelers did not prevail on any claim it asserted in the bankruptcy proceedings." PA 2a.

Travelers did not seek review of those findings before this Court. As much as it wishes to dispute these fact-bound findings with the same arguments roundly rejected below, it has waived the chance to do so now. *See Singleton v. Wulff*, 428 U.S. 106, 119 (1976).

The purpose of the reasonableness requirement is to ensure that estate assets are not squandered by creditors "exhibiting excessive caution, overzealous advocacy and hyperactive legal efforts." *In re Gwyn*, 150 B.R. 150, 155 (Bankr. M.D.N.C. 1993). There is no more apt description of Travelers' participation in this bankruptcy case—litigating over a disallowance that was statutorily mandated, *see* § 502(e)(1), only to stipulate that it was disallowed, and pressing for "comfort language" that preserved rights Travelers automatically had by statute. The Court of Appeals was correct when it worried that if every contractual creditor were to be rewarded for doing what Travelers did, "the system would likely be overwhelmed by fee applications, with no funds available for disbursement to impaired creditors or debtor reorganization." PA 3a.

III. TRAVELERS CANNOT RECOVER THE ATTORNEYS' FEES IT INCURRED IN THE BANKRUPTCY PROCEEDING BECAUSE ITS CONTRACT DOES NOT GRANT IT ANY SUCH RIGHT.

The premise of this entire appeal—incorporated directly into Travelers' Question Presented—is that "Petitioner and Respondent entered into a contract that included a provision that Petitioner is entitled to recover its attorneys' fees incurred in . . . litigating its rights during the course of Respondent's bankruptcy case." Pet. i. Only if that premise is correct could Travelers insist that it has a "claim" for

attorneys' fees, within the meaning of § 101(5), and that the claim is allowable under § 502(b). Because Travelers' premise is false, the entire conversation about statutory construction is beside the point.

As PG&E has argued throughout this litigation, the indemnity agreements do not grant Travelers a right to recover attorneys' fees it incurred to participate in a bankruptcy proceeding when its rights were not in jeopardy. The contractual language on which Travelers relies does not say (as Travelers repeatedly renders it) that "PG&E is obligated to reimburse Travelers for any and all attorneys' fees that Travelers incurs in connection with the bonds." Pet'r Br. at 6; *see, e.g., id.* at 1, 7, 9. Rather, the only provision Travelers can invoke here is the one it emphasized throughout the litigation, authorizing recovery of attorneys' fees for "*enforcing* by litigation or otherwise any of the [indemnification] agreements herein contained." SJA 9 (emphasis added).[22] Travelers was not "enforcing . . . any of

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[22] Another clause obliges PG&E to "*indemnify . . . and hold and save harmless [Travelers] against all demands, claims*, loss, costs, damages, expenses and attorneys' fees whatever and all liability therefore, sustained or incurred by [Travelers] by reason of executing" the bonds. SJA 9 (emphasis added). Travelers did not emphasize this provision below, because California law is clear that this hold-harmless obligation is triggered only when a *third party* sues Travelers in connection with the bonds. *See U.S. Fid. & Guar. Co. v. More*, 155 Cal. 415, 418 (1909) ("Clearly, this language does not import a right of recovery upon the part of a surety company for anything less than a legal liability which it may have incurred.").

Travelers is now collaterally estopped from arguing otherwise, or from arguing that PG&E "commenc[ed] litigation" against Travelers by making a valid objection. *E.g.*, Pet'r Br. at 16. Travelers lost both arguments when it sought to recover the same attorneys' fees that are at issue here, under an indemnity agreement with PG&E's parent company with a hold-harmless provision that was virtually identical to the one quoted immediately above. *See Travelers Cas. & Sur. Co. v. PG&E Corp.*, No. C-05-0594, 2005 WL 1039080 at *2-*3 (N.D. Cal. May 4,

the indemnification agreements" when it participated in the bankruptcy, because (again, as the courts below all agreed) the agreements were not breached, not in danger of being breached, and not threatened by any position PG&E took.

This Court should address this contractual issue, which PG&E has pressed throughout this litigation, even though the Court of Appeals did not address it. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 (1979); *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984). The single word that controls—"enforcing"—is, susceptible of only one reasonable interpretation. And, while not purporting to dispose of the issue of contract interpretation, all three courts below did conclude that Travelers was not enforcing anything.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

2005). Only after the Court of Appeals issued its opinion in this case did Travelers settle the parallel case and withdraw its pending appeal, giving the ruling final and preclusive effect. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (preclusive effect of a federal diversity court's judgment is determined, under federal law, by applying "the law that would be applied by state courts in the State in which the federal diversity court sits"); *Abelson v. Nat'l Union Fire Ins. Co.*, 28 Cal. App. 4th 776, 787 (1994) ("according to California law, a judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by appeal") (collecting authorities). PG&E has requested permission to lodge the stipulation of dismissal with the Clerk of the Court, pursuant to S. Ct. R. 32.3.

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STATUTORY APPENDIX

11 U.S.C. § 506(a) and (b) provide, in relevant part, as follows (with *italics* indicating a recent amendment that is inapplicable to this case):

§ 506. Determination of secured status.

(a)*(1)* An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

* * *

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement *or State statute* under which such claim arose.

* * *